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No. 806

In the Supreme Court of the United States

OCTOBER TERM, 1960

DEPARTMENT & SPECIALTY STORE EMPLOYEES' UNION, LOCAL 1265, R.C.I.A., AFL–CIO, PETITIONER

v.

GERALD A. BROWN, REGIONAL DIRECTOR, TWENTIETH REGION, NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the district court (Pet. App. A, pp. XXXI–XXXII), granting respondent's motion to dismiss the complaint, is reported at 187 F. Supp. 865. The opinion of the court below (Pet. App. A, pp. I–XIX, XXVII–XXVIII), affirming the order of the district court, is reported at 284 F. 2d 619.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1960 (Pet. App. A, p. XXX). On

February 1, 1961, the Chief Justice entered an order extending the time for filing a petition for certiorari to March 14, 1961. The petition for certiorari was filed on March 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court has jurisdiction, under its equity powers, to review an order directing an election under Section 8(b)(7)(C) of the National Labor Relations Act, as amended, where another adequate procedure exists for obtaining review and the petitioner is in fact utilizing that procedure.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 541, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, pp. XXXIII–XXXVII of the petition, and in Appendix A, p. 17, *infra*.

STATEMENT

A. *Introduction*

This case arises out of an attempt, by independent equity suit in the district court, to enjoin an election ordered by the Regional Director of the National Labor Relations Board under Section 8(b)(7)(C), a provision added to the Act by the 1959 amendments. Section 8(b)(7) bans picketing for recognition or organizational purposes:

> (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning

representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing * * *.

Subparagraph (C) is subject to two provisos. The first reads:

> *Provided*, That when such a petition has been filed the Board shall *forthwith, without regard to the provisions of section 9(c)(1)* or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof * * * [emphasis added].

The second reads:

> *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

The Board, in its Rules and Regulations,[1] has established a procedure for implementing Section 8(b)(7). In brief, the rules provide that, upon the filing of a charge alleging that a labor organization is picketing for objectives prohibited by Section 8(b)(7), the case is promptly investigated. If it appears from such investigation that the picketing is barred under subparagraphs (A), (B), or (C), the Regional Director issues an unfair labor practice complaint and makes application in the appropriate federal district court for an injunction against the picketing under Section 10(l) of the Act. However, where the investigation shows that the issuance of a complaint under (C) might be warranted but for the fact that a timely representation petition has been filed, the Regional Director "dismisses" the charge and proceeds with the petition. If he finds that there are no issues which require a prior hearing, he is empowered to direct an immediate election in an appropriate unit, and to certify the results. Should the picketing union win the election and be certified as the bargaining representative, it is free to continue its picketing.[2] On the other hand, should it lose the election and continue picketing, the Regional Director may, upon the filing of another charge, issue an unfair labor practices complaint under Section 8(b)(7)(B), which bans recognition or organizational picketing within 12 months of a valid election, and

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[1] The relevant portions of the Rules and Regulations are set forth in Appendix B, pp. 19–28, *infra*.

[2] The terms of Section 8(b)(7) specifically exempt picketing by a labor organization which is "currently certified" as the representative of the employees involved.

the Regional Director may also make application in the appropriate district court for an injunction against the picketing under Section 10(l) of the Act; the Board will subsequently hold a hearing on the complaint and its ultimate decision will be subject to review in a court of appeals under Section 10 (e) or (f) of the Act.' In both the hearings before the district court and the Board, the union may bring into question not only the validity of the election but also the legality of the picketing under the second proviso of Section 8(b)(7)(C).

B. *The Board proceedings*

On February 4, 1960, petitioner Union sent a letter to G. R. Kinney Co., Inc., which operates a retail shoe store in Oakland, California, stating that petitioner "intends to engage in an advertising campaign to inform the public that your store does not operate under fair Union conditions" (R. 5, 13, 39).[3] The letter further stated that petitioner did "not claim at this time to represent a majority of the employees in your store," and added that it was not petitioner's intention "to secure a Union contract * * * until and unless a majority of your employees at your store voluntarily without any coercion of any kind designate the Union as their collective bargaining representative" (R. 13–14, 39). On the following day, petitioner established a picket line in front of the Kinney store (R. 5–6, 39); the legends on the signs read: "This store does not operate under AFL–CIO union conditions. Please do

[3] References are to the printed transcript of record in the court below.

not patronize, Department & Specialty Store Employees Union, Local 1265." In addition, the pickets handed out to passers-by leaflets captioned "A Message To The Public," which stated that "The employees of this store do not enjoy Union wages, hours, and other working conditions" and that "Your patronage of this store breaks down * * * fair wages and working conditions which prevail in Union stores and threatens the jobs of our members at those stores" (R. 6, 14–15, 39).

On February 17, 1960, Kinney filed with respondent Regional Director an unfair labor practice charge alleging that the Union was picketing for objects proscribed by Section 8(b)(7) of the Act—*i.e.*, for the purpose of "forcing or requiring the employer to recognize or bargain with [petitioner] * * * and/or forcing or requiring the employees of this employer to accept or select [petitioner] as their collective bargaining representative." Kinney also filed a representation petition requesting that an election be conducted to determine whether the employees wished to be represented by the Union (R. 6–7, 16–20, 40).

Pursuant to the procedure established in the Board's Rules and Regulations, the Regional Director investigated the charge. Upon the basis of that investigation, he found that the picketing was for objects proscribed by Section 8(b)(7) and within the purview of subparagraph (C) thereof, but that a representation petition had been filed within a reasonable time from the commencement of the picketing. Accordingly, the Director concluded that an expedited election, under the first proviso to subparagraph (C), was warranted (R. 45). He issued a notice of an

election to be held on March 14, and advised the parties that no complaint would be issued on the charge (R. 8–10, 21–29, 45).

Petitioner urged the Director not to hold the election on the ground that such an election would be unauthorized unless it were first established, after formal hearing, that a question concerning representation existed and that the picketing was a violation of Section 8(b)(7)(C) (R. 8–9, 10–11, 45–46). The Director denied petitioner's request for a stay of election. The same request was then made to the Board which denied it on March 11, 1960 (R. 9, 20–21, 46).

C. *The judicial proceedings*

Thereupon, petitioner brought suit in the district court to enjoin the Regional Director from proceeding with the scheduled election, and obtained a temporary restraining order (R. 34). The gravamen of the complaint was that the Director violated the Act and the Constitution in directing an election without a determination having first been made, pursuant to the hearing requirements of Section 10(b) of the Act, that petitioner's picketing constituted an unfair labor practice under Section 8(b)(7)(C) (R. 10–11). The Director moved to dismiss the complaint on the grounds that (1) the court was without jurisdiction over the subject matter; (2) the holding of the election would not result in such injury as warranted the granting of injunctive relief; and (3) the complaint failed to state a cause of action (R. 35, 46). The district court, after hearing, granted the Director's motion to dismiss the complaint and denied petitioner's motion for a preliminary injunction. The court concluded that it was without jurisdiction

in that plaintiff had failed to establish that the holding of the election violated either statutory or constitutional requirements (R. 36–37, 38–47).

Petitioner then took an appeal to the court below, and applied to it for a stay of the election pending disposition of the appeal. On April 11, 1960, the court of appeals, after hearing, denied a stay. A further application for a stay made to Mr. Justice Douglas was denied on April 18, 1960. The election was held on that day.[4]

The court below affirmed the district court's dismissal of the complaint on jurisdictional grounds (Pet. App. A, p. XIX).

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[4] In the representation election among Kinney's employees on April 18, 1960, the employees unanimously rejected petitioner. Notwithstanding the election and the results thereof, the Union continued to picket the Kinney store as before. Kinney then filed a charge with the Regional Director, alleging that the picketing after the election constituted a violation of Section 8(b)(7)(B) of the Act. After investigation of this charge, the Regional Director concluded that there was reasonable cause to believe that the Union was engaging in the unfair labor practices charged. Accordingly, he issued a complaint based on the charge, and petitioned the district court for an injunction against the picketing pending a Board determination of the matter. In the district court, the Union was allowed to question the validity of the election and whether its picketing had been legitimate informational picketing under the second proviso of Section 8(b)(7)(C). On June 8, 1960, the court, after hearing, denied the petition for an injunction. Holding that Section 8(b)(7) did not bar informational picketing which sought recognition or organization only as an ultimate rather than an immediate object, the court found that such was the nature of the Union's post-election picketing. *Brown* v. *Department & Specialty Store Employees' Union, Local 1265*, 187 F. Supp. 619 (N.D. Cal.). The case is now pending decision before the Board, the Trial Examiner having recommended that the complaint be dismissed for the reasons given by the district court.

ARGUMENT

Under settled principles, Board action in directing a representation election may not be reviewed by an independent equity suit in the district court, except in the limited situation where the Board has contravened a specific statutory prohibition or the requirements of due process, *and* there is no other adequate means of redressing the wrong.[5] Petitioner seeks to sustain district court jurisdiction by challenging the election directed, and subsequently conducted, by the Regional Director on the grounds that the procedure followed by him is contrary to the statute and to the Constitution. The two lower courts correctly dismissed the suit, for, irrespective of the validity of the action taken in this case, an adequate procedure exists for obtaining review thereof. Resort to an independent district court suit is thus foreclosed.

1. Although the Board's rules permit the holding of an election without a prior hearing, the picketing is not curtailed until the union has had an opportunity to present its contentions with respect to the

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[5] *Leedom* v. *Kyne*, 358 U.S. 184; *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127 (C.A. 2); *McLeod* v. *Local 476, Industrial Workers*, 47 LRRM 2761 (C.A. 2) March 14, 1961; *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237 (C.A. D.C.); *International Association of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514 (C.A. D.C.), certiorari denied, 364 U.S. 815; *Leedom* v. *Norwich, Conn. Printing Specialties*, Local 494, 275 F. 2d 628 (C.A. D.C.), certiorari denied, 362 U.S. 969; *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (C.A. D.C.), certiorari denied, 359 U.S. 1011; *Norris* v. *National Labor Relations Board*, 177 F. 2d 26 (C.A. D.C.); *Atlas Life Insurance Co.* v. *Leedom*, 284 F. 2d 231 (C.A. D.C.); *Volney Felt Mills* v. *LeBus*, 196 F. 2d 497 (C.A. 5).

validity of the election (see the Statement, *supra*, pp. 4–5). Thus where, as here, the union loses the election, and another unfair labor practice charge—alleging that the union's continued picketing violates Section 8(b)(7)(B)—is filed, investigated and found to have merit, the union will be able to contest the validity of the election, including such matters as the validity of the order directing it, in the federal district court proceedings, brought under Section 10(l), to enjoin the picketing pending a final Board determination (see the Statement, p. 5, and n. 4, p. 8, *supra*). Moreover, the union is afforded a further opportunity to relitigate this question at the hearing in the Section 8(b)(7)(B) unfair labor practice proceeding before the Board, and to obtain review of the ultimate Board decision in the court of appeals under Section 10(e) and (f) of the Act.

In short, petitioner's contentions respecting the validity of the procedure adopted by the Board for holding elections under Section 8(b)(7)(C) and the propriety of subjecting its picketing to such an election can be reviewed in the subsequent Section 8(b)(7)(B) proceedings, and, until then, its picketing may continue. To be sure, petitioner may suffer some disadvantage from having to participate in the election first and then to attempt to have it set aside. (Pet. 14–15). However, the detriment to the union in participating in an election which may later be invalidated is not essentially different from that incurred by an employer who—though believing that a Board representation determination is invalid—must nevertheless go through with the election, permit a certification to

issue, and wait for the institution of unfair labor practice proceedings before he can contest the validity of the election.[8] Since petitioner is afforded an equivalent opportunity to obtain ultimate review of the determination complained of here, as in the case of the employer, it must exhaust the procedure provided and cannot circumvent it by a district court suit of this kind. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

2. The legal issues involved do not warrant a departure from the exhaustion principle.

(a) Petitioner's main contention is that an election under the first proviso to Section 8(b)(7)(C) of the Act may be conducted only after the Board has determined, pursuant to the formal unfair labor practice procedures of Section 10(b), that the picketing violates Section 8(b)(7)(C) (Pet. 2–3, 19–21). As the court below properly concluded (Pet. App. A, pp. XII, XVI), this view misconceives the function served by the election procedure contained in the first proviso and would prevent this provision from serving its intended purpose.

As shown in the Statement (*supra*, pp. 2–4), Section 8(b)(7)(C) bans picketing, not protected by the second proviso, only when it has been conducted beyond a reasonable period of time without a representation petition having been filed. If a timely petition is filed, such picketing is "saved" from becoming an unfair labor practice, at least until after

[8] *Norris* v. *National Labor Relations Board*, 177 F. 2d 26 (C.A. D.C.); *Atlas Life Insurance Co.* v. *Leedom*, 284 F. 2d 231 (C.A. D.C.); *Valley Felt Mills* v. *LeBus*, 196 F. 2d 497 (C.A. 3).

an election is conducted, by virtue of the first proviso. In other words, the first proviso election mechanism comes into play only with respect to picketing which has not as yet become an unfair labor practice because the timely filing of a representation petition precludes an unfair labor practice from being completed. Accordingly, to condition the use of that election mechanism upon a prior determination—made pursuant to the formal unfair labor practice procedures of Section 10(b)—that an unfair labor practice has occurred, would completely distort the statutory scheme.

(b) The question whether the Board is required to provide a representation-type hearing, as specified in Section 9(c)(1), before directing an election under the first proviso to Section 8(b)(7)(C), is more substantial. The proviso reads that, when a representation petition is filed, "the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate." Section 9(c)(1) contains not only the requirement that a hearing be held before an election is conducted, but also the requirement that the union shall have asserted "a claim to be recognized as the representative." On the one hand, since Congress rejected a proposal which would have permitted the holding of elections without prior hearings, in representation

cases generally,[7] it may be argued that it was intended, by the phrase "without regard to the provisions of section 9(c)(1)," merely to dispense with the requirement of a claim to recognition. On the other hand, as the court below noted (Pet. App. A, p. XII–XVI), there are persuasive reasons for reading the phrase as encompassing the hearing requirement of Section 9(c)(1) as well. The language used is not limited to the recognition requirement; the term "forthwith," which precedes it, evidences an intention to expedite elections conducted under the first proviso; and, to require the Board to hold a hearing before conducting an election under that proviso could result in prolonging the period of the picketing well beyond the 30-day period envisaged, in the first clause of Section 8(b)(7)(C), as a reasonable terminal point.[8] In these circumstances, it cannot be said that the Board, in adopting the latter view and in thus establishing a procedure which defers a hearing on the propriety of directing an election under the first proviso until the subsequent Section 8(b)(7)(B) proceeding, so far exceeded its authority under the statute as to warrant upsetting the Board's

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[7] See S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., pp. 29–31, 105 Cong. Rec. 18128; Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) pp. 425–427, 1714; cf. 105 Cong. Rec. 18153, Leg. Hist. 1813.

[8] The timely filing of a representation petition permits the picketing to continue pending the holding of the election and the certification of the election results. In the conventional representation case, which requires a hearing before election, the period from petition to certification is at least three months.

procedure by means of an independent equity suit in the district court.[9]

(c) Finally, petitioner contends (Pet. 8–12) that its picketing fell within the second proviso to Section 8(b)(7)(C), and was therefore exempted from the section and the election procedure of the first proviso. This is an issue as to which there is a wide divergence of views.[10] The problem is new. It is still under active consideration by the Board. The lower courts have not yet had occasion for thorough analysis. Therefore, it is not ripe for Supreme Court review.

3. Petitioner is pursuing its other remedy and has no need for extraordinary relief. As noted (n. 4, *supra*, p. 8), the Union was permitted to assert the invalidity of the election and the legitimacy of its picketing, both before the district court in the Section 10(l) phase and before the Trial Examiner in the Board phase of the subsequent Section 8(b)(7)(B)

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[9] Nor, in view of the opportunity to obtain review of the validity of the election before the union's right to picket is affected, does the Board's procedure violate due process requirements. See *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 710; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152–153; *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599; *Hagar* v. *Reclamation District*, 111 U.S. 701, 711–712; *Lichter* v. *United States*, 334 U.S. 742, 791–792; *Bowles* v. *Willingham*, 321 U.S. 503, 520.

[10] See *McLeod* v. *Chefs*, 280 F. 2d 760, 47 LRRM 2541 (C.A. 2); *National Labor Relations Board* v. *Local 239, Teamsters*, 48 LRRM 2076 (C.A. 2), April 17, 1961; *Getreu* v. *Bartenders, Local 58*, 181 F. Supp. 738 (N.D. Ind.); *Local Joint Board of Hotel and Restaurant Employees (Crown Cafeteria)*, 130 NLRB No. 68, February 20, 1961, petition for reconsideration pending; Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 267–268 (1959).

proceeding. The Union prevailed in both instances, although the matter is now pending before the Board on exceptions to the Trial Examiner's report. Thus, the Union has remained free to continue the picketing, notwithstanding the adverse election.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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MAY, 1961.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth in the petition, are as follows:

SEC. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

APPENDIX B

The relevant provisions of the Board's Rules and Regulations and Statements of Procedure, Series 8, are as follows:

RULES AND REGULATIONS

* * * * * *

SUBPART D—PROCEDURE FOR UNFAIR LABOR PRACTICE AND REPRESENTATION CASES UNDER SECTIONS 8(B)(7) AND 9(C) OF THE ACT

[29 C.F.R. (Cum. Pocket Supp.) 102.73, *et seq.*]

SEC. 102.73 *Initiation of proceedings.*—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of section 8(b)(7) of the act, the regional director shall investigate such charge, giving it the priority specified in Subpart G of these rules.

SEC. 102.74 *Complaint and formal proceedings.*—If it appears to the regional director that the charge has merit, formal proceedings in respect thereto shall be instituted in accordance with the procedures described in sections 102.15 to 102.51, inclusive, insofar as they are applicable, and insofar as they are not inconsistent with the provisions of this subpart. If it appears to the regional director that issuance of a complaint is not warranted, he shall decline to issue a complaint, and the provisions of section 102.19, including the provisions for appeal to the general counsel, shall be applicable unless an election has been directed under sections 102.77 and 102.78, in which event the provisions of section 102.81 shall be applicable.

SEC. 102.75 *Suspension of proceedings on the charge where timely petition is filed.*—If it appears to the regional director that issuance of a complaint may be warranted but for the

pendency of a petition under section 9(c) of the act, which has been filed by any proper party within a reasonable time not to exceed 30 days from the commencement of picketing, the regional director shall suspend proceedings on the charge and shall proceed to investigate the petition under the expedited procedure provided below, pursuant to the first proviso to subparagraph (C) of section 8(b)(7) of the act.

SEC. 102.76 *Petition; who may file; where to file; contents.*—When picketing of an employer has been conducted for an object proscribed by section 8(b)(7) of the act, a petition for the determination of a question concerning representation of the employees of such employer may be filed in accordance with the provisions of sections 102.60 and 102.61, insofar as applicable: *Provided, however,* That if a charge under section 102.73 has been filed against the labor organization on whose behalf picketing has been conducted, the petition shall not be required to contain a statement that the employer declines to recognize the petitioner as the representative within the meaning of section 9(a) of the act; or that the labor organization is currently recognized but desires certification under the act; or that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative; or, if the petitioner is an employer, that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate.

SEC. 102.77 *Investigation of petition by regional director; directed election.*—(a) Where a petition has been filed pursuant to section 102.76 the regional director shall make an investigation of the matters and allegations set forth therein. Any party, and any individual or labor organization purporting to act as

representative of the employees involved and any labor organization on whose behalf picketing has been conducted as described in section 8(b)(7)(C) of the act, may present documentary and other evidence relating to the matters and allegations set forth in the petition.

(b) If after the investigation of such petition or any petition filed under subpart C of these rules, and after the investigation of the charge filed pursuant to section 102.73, it appears to the regional director that an expedited election under section 8(b)(7)(C) is warranted, and that the policies of the act would be effectuated thereby, he shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter: *Provided, however,* That in any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board before election, he may issue and cause to be served on the parties, individuals, and labor organizations involved a notice of hearing before a hearing officer at a time and place fixed therein. In this event, the method of conducting the hearing and the procedure following, including transfer of the case to the Board, shall be governed insofar as applicable by sections 102.63 to 102.68, inclusive, except that the parties shall not file briefs without special permission of the Board and except that the parties shall, however, state their respective legal positions upon the record at the close of the hearing.

SEC. 102.78 *Election procedure; method of conducting balloting; postballoting procedure.*— If no agreement such as that provided in section 102.79 has been made, the regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements for the balloting. The method of conducting the balloting and the postballoting

procedure shall be governed, insofar as applicable, by the provisions of sections 102.69 and 102.70 except that the labor organization on whose behalf picketing has been conducted may not have its name removed from the ballot without the consent of the regional director and except that the regional director's rulings on any objections or challenged ballots shall be final unless the Board grants special permission to appeal from the regional director's rulings. Any request for such permission shall be filed promptly, in writing, and shall briefly state the grounds relied upon. The party requesting review shall immediately serve a copy thereof on each other party. A request for review shall not operate as a stay of the regional director's rulings unless so ordered by the Board.

SEC. 102.79 *Consent-election agreements.*— Where a petition has been duly filed, the parties involved may, subject to the approval of the regional director, enter into an agreement governing the method of conducting the election as provided for in section 102.62(a), insofar as applicable.

SEC. 102.80 *Dismissal of petition; refusal to process petition under expedited procedure.*— (a) If, after a petition has been filed pursuant to the provisions of section 102.76, it shall appear to the regional director that further proceedings in respect thereto in accordance with the provisions of section 102.77 are not warranted, he may dismiss the petition, and the action of the regional director shall be final, subject to a prompt appeal to the Board on special permission which may be granted by the Board. Upon such appeal the provisions of section 102.71 shall govern insofar as applicable. Such appeal shall not operate as a stay unless specifically ordered by the Board.

(b) If it shall appear to the regional director that an expedited election is not warranted but that proceedings under subpart C of these rules

are warranted, he shall so notify the parties in writing with a simple statement of the grounds for his decision.

(c) Where the regional director, pursuant to sections 102.77 and 102.78, has determined that a hearing prior to election is not required to resolve the issues raised by the petition and has directed an expedited election, any party aggrieved may file a request with the Board for special permission to appeal from such determination. Such request shall be filed promptly, in writing, and shall briefly state the grounds relied upon. The party requesting such appeal shall immediately serve a copy thereof on each other party. Should the Board grant the requested permission to appeal, such action shall not, unless specifically ordered by the Board, operate as a stay of any action by the regional director.

SEC. 102.81 *Final processing of charge held during pendency of petition; review by the general counsel.*—(a) Where an election has been directed by the regional director or the Board in accordance with the provisions of sections 102.77 and 102.78, the regional director shall decline to issue a complaint on the charge, and he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel in Washington, D.C., and filing a copy of the request with the regional director, within 3 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based. Such request for review shall not operate as a stay of any action by the regional director.

(b) Where an election has not been directed and the petition has been dismissed in accord-

ance with the provisions of section 102.80, the regional director shall resume investigation of the charge and shall proceed in accordance with section 102.74.

SEC. 102.82. *Transfer, consolidation, and severance.*—The provisions of sections 102.33 and 102.72, respecting the filing of a charge or petition with the general counsel and the transfer, consolidation, and severance of proceedings, shall apply to proceedings under this subpart of these rules, except that the provisions of section 102.73 to 102.81, inclusive, shall govern proceedings before the general counsel.

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STATEMENTS OF PROCEDURE

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SUBPART D—UNFAIR LABOR PRACTICE AND REPRESENTATION CASES UNDER SECTIONS 8(B)(7) AND 9(C) OF THE ACT

[29 C.F.R. (Cum. Pocket Supp.) 101.22, *et seq.*]

SEC. 101.22 *Initiation and investigation of a case under section 8(b)(7).*—(a) The investigation of an alleged violation of section 8(b)(7) of the act is initiated by the filing of a charge. The manner of filing such charge and the contents thereof are the same as described in section 101.2. In some cases, at the time of the investigation of the charge, there may be pending a representation petition involving the employees of the employer named in the charge. In those cases, the results of the investigation of the charge will determine the course of the petition.

(b) The investigation of the charge is conducted in accordance with the provisions of section 101.4, insofar as they are applicable. If the investigation reveals that there is merit in the charge, a complaint is issued as described in section 101.8, and an application is made for an injunction under section 10(l) of the act, as described in section 101.37. If the investigation reveals that there is no merit in the

charge, the regional director, absent a withdrawal of the charge, dismisses it, subject to appeal to the general counsel. However, if the investigation reveals that issuance of a complaint may be warranted but for the pendency of a representation petition involving the employees of the employer named in the charge, action on the charge is suspended pending the investigation of the petition as provided in section 101.23.

SEC. 101.23 *Initiation and investigation of a petition in connection with a case under section 8(b)(7).*—(a) A representation petition [1] involving the employees of the employer named in the charge is handled under an expedited procedure when the investigation of the charge has revealed that: (1) the employer's operations affect commerce within the meaning of the act; (2) picketing of the employer is being conducted for an object proscribed by section 8(b)(7) of the act; (3) subparagraph (C) of that section is applicable to the picketing; and (4) the petition has been filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing. In these circumstances, the member of the regional director's staff, to whom the matter has been assigned, investigates the petition to ascertain further: (1) the unit appropriate for collective bargaining; and (2) whether an election would in that unit effectuate the policies of the act.

(b) If, based on such investigation, the regional director determines that an election is warranted, he may, without a prior hearing, direct that an election be held in an appropriate unit of employees. Any party aggrieved may file a request with the Board for special per-

[1] The manner of filing of such petition and the contents thereof are the same as described in sec. 101.17, except that the petitioner is not required to allege that a claim was made upon the employer for recognition or that the union represents a substantial number of employees.

mission to appeal that action to the Board, but such review, if granted, will not, unless otherwise ordered by the Board, stay the proceeding. If the regional director determines than an election is not warranted, he dismisses the petition or makes other disposition of the matter. Should he conclude that an election is warranted, he fixes the basis of eligibility of voters and the place, date, and hours of balloting. The mechanics of arranging the balloting, the other procedures for the conduct of the election, and the postelection proceedings are the same, insofar as appropriate, as those described in section 101.19, except that the regional director's rulings on any objections to the conduct of the election or challenged ballots are final and binding, unless the Board, on an application by one of the parties, grants such party special permission to appeal from the regional director's rulings. The party requesting such review by the Board must do so promptly, in writing, and state briefly the grounds relied upon. Such party must also immediately serve a copy on each of the other parties, including the regional director. Neither the request for review by the Board nor the Board's grant of such review operates as a stay of any action taken by the regional director, unless specifically so ordered by the Board. If the Board grants permission to appeal, and it appears to the Board that substantial and material factual issues have been presented with respect to the objections to the conduct of the election or challenged ballots, it may order that a hearing be held on such issues or take other appropriate action.

(c) If the regional director believes, after preliminary investigation of the petition, that there are substantial issues which require Board determination before an election may be held, he may order a hearing on the issues. This hearing is followed by Board decision and direction of election, or other disposition. The procedures to be used in connection with such

hearing and posthearing proceedings are the same, insofar as they are applicable, as those described in section 101.21, except that the parties may not file briefs with the Board, unless special permission therefor is granted by the Board, although they may state their respective legal positions fully on the record at the hearing.

(d) Should the parties so desire, they may, with the approval of the regional director, resolve the issues as to the unit, the conduct of the balloting, and related matters pursuant to informal consent procedures, as described in section 101.19(a).

(e) If a petition has been filed which does not meet the requirements for processing under the expedited procedure, the regional director may process it under the procedures set forth in subpart C.

SEC. 101.24 *Final disposition of a charge which has been held pending investigation of the petition.*—(a) Upon the determination that the issuance of a direction of election is warranted on the petition, the regional director, absent withdrawal of the charge, dismisses it subject to an appeal to the general counsel in Washington, D.C.

(b) If, however, the petition is dismissed or withdrawn, the investigation of the charge is resumed, and the appropriate steps described in section 101.22 are taken with respect to it.

SEC. 101.25 *Appeal from the dismissal of a petition; or from the refusal to process it under the expedited procedure.*—If the regional director determines after his investigation of the representation petition that further proceedings based thereon are not warranted, he, absent withdrawal of the petition, dismisses it, stating the grounds therefor. If the regional director determines that the petition does not meet the requirements for processing under the expedited procedure, he advises the petitioner of his determination to process the petition

under the procedures described in subpart C. In either event, the regional director informs all the parties of his action, and such action is final, although the Board may grant an aggrieved party permission to appeal from the regional director's action. Such party must request such review promptly, in writing, and state briefly the grounds relied upon. Such party must also immediately serve a copy on each of the other parties, including the regional director. Neither the request for review by the Board, nor the Board's grant of such review, operates as a stay of the action taken by the regional director, unless specifically so ordered by the Board.

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